

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA M. LAZARSKI and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Milwaukee, Wis.

*Docket No. 98-2479; Submitted on the Record;
Issued March 24, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's untimely request for a written review of the record.

On November 2, 1995 appellant, then a 27-year-old mail processor, filed a notice of occupational disease, claiming that her disc herniation was caused by the repetitive bending, lifting and twisting required by her work. On April 29, 1996 the Office informed appellant that her claim had been accepted for low back strain, but not for herniated discs at L4-5 and L5-S1.

Appellant accepted a light-duty position on June 25, 1996 and requested a schedule award on July 13, 1996.

On February 12, 1997 the Office denied appellant wage-loss compensation for the period July 6 to 11, 1996 on the grounds that the record contained no evidence supporting disability during this period. Attached to the decision was a statement of appellant's appeal rights.

On March 27, 1997 the Office referred appellant for a second opinion evaluation to Dr. Vijay V. Kulkarni, a Board-certified orthopedic surgeon, after the employing establishment asked the Office to determine whether appellant had temporary or permanent disability or aggravation of her preexisting degenerative disc disease.

Based on Dr. Kulkarni's April 21, 1997 report, the Office issued a notice of proposed termination of benefits on June 10, 1997 and permitted appellant 30 days to submit evidence or argument showing continued disability caused by the June 1995 injury. In response, appellant stated that both Dr. Kulkarni and her treating physician, Dr. Eric C. Christianson, Board-certified in family practice, found that her work restrictions were permanent. She submitted medical reports dated October 11, 1995, March 26, 1996 and February 18, 1997 from Dr. Christianson.

In memoranda to the file, the Office noted that appellant's injury was occupational, not traumatic, and further clarification was needed from Dr. Kulkarni on whether the aggravation of appellant's preexisting condition was permanent or temporary.

In a letter dated October 17, 1997, Dr. Kulkarni stated that appellant had "a residual permanent impairment, amounting to about five percent of the function of the spine" as a result of her injury in June 1995. Although there were no objective physical signs in her back, appellant would have further recurrences of back pain and her impairment is related to the recurrent back pain. Dr. Kulkarni added that appellant had reached maximum medical improvement.

The Office decided that another second opinion was necessary and referred appellant to Dr. Stephen E. Robbins, a Board-certified orthopedic surgeon, who examined her on December 2, 1997. He concluded that appellant had only a temporary aggravation of her back condition resulting from work activities, but should avoid repetitive bending, lifting and twisting, with a weight limit of 25 pounds. Dr. Robbins recommended that appellant continue with light duty but reiterated that she had no permanent partial disability in her lumbar spine.

On February 4, 1998 appellant wrote to the Office seeking a decision on her claim, noting that her case had been "neglected" for more than two years. On May 26, 1998 appellant requested a written review of the record and stated that Dr. Robbins' December 10, 1997 report, should be "discredited" because of the inaccuracies she had listed.

On July 20, 1998 the Office denied appellant's request for a written review on the grounds that it was untimely filed. Appellant informed the Office that she had never received a decision dated February 12, 1997, or any further decision on the termination of her compensation.

The Board finds that appellant's request for a written review of the record was untimely filed.

The Federal Employees' Compensation Act¹ is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing before a representative of the Office.² The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.³ Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.⁴

¹ 5 U.S.C. §§ 8101-8193 (1974).

² 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ____ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

³ *Eileen A. Nelson*, 46 ECAB 377, 380 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (March 1997).

⁴ *William F. Osborne*, 46 ECAB 198, 202 (1994).

The regulation implementing section 8124(b)(1) provides that a claimant may request a review of the written record in lieu of the oral hearing, but the same rules apply.⁵ The regulation is clear that a claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision.⁶ Section 10.131(b) is equally clear that the date on which the request is deemed “made” should be “determined by the postmark of the request,” rather than any other date.⁷

In this case, appellant argues that she never received a February 12, 1997 decision, from the Office. This decision denied appellant’s claim for compensation for the period June 6 to 11, 1996. However, the record indicates that this decision with accompanying cover letter was sent to appellant’s current address, which has not changed since she filed her claim. Under the mailbox rule the Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸

Here, there is no evidence indicating that appellant did not receive the Office’s decision. In fact, appellant responded to the Office’s February 19, 1997 letter, on March 2, 1997 and to many other Office documents sent to her. Therefore, the Board finds that appellant’s May 26, 1998 request for a written review of the record was untimely filed.

Nonetheless, even when the request for a written review is not timely, the Office has the discretion to grant such review and must exercise that discretion.⁹ Here, the Office informed appellant in its July 20, 1998 decision, that it had considered the matter in relation to the issue involved and denied a written review on the basis that she could request reconsideration and submit evidence in support of her claim for compensation from July 6 to 11, 1996.

The Board has held that the only limitation on the Office’s authority is reasonableness,¹⁰ and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹¹

In this case, nothing in the record indicates that the Office committed any abuse of discretion in denying appellant’s request for a review of the record. Appellant was fully advised that she could request reconsideration and submit evidence in support and appellant has offered

⁵ 20 C.F.R. § 10.131(b).

⁶ *Coral Falcon*, 43 ECAB 915, 918 (1992).

⁷ *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

⁸ *Charles R. Hibbs*, 43 ECAB 699, 701 (1992).

⁹ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

¹⁰ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

¹¹ *Wilson L. Clow, Jr.*, 44 ECAB 157, 175 (1992).

no argument to justify further discretionary review by the Office.¹² Thus, the Board finds that the Office properly denied appellant's request for a written review of the record.

The Board notes that the record contains a June 10, 1997 preliminary decision on the issue of whether appellant's disability compensation should be terminated. As this is not a final decision of the Office, this aspect of appellant's claim is in an interlocutory position and not before the Board in the present appeal.¹³

The July 20, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 24, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

¹³ *See* 20 C.F.R. § 501.2(c).